IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.623 OF 2002

Navasha Babu Vad ...Appellant
Vs.
The State of Maharashtra & Ors. ...Respondents

WITH

CRIMINAL APPEAL NO.664 OF 2002

Ramesh Deepak Vayade & Ors. ...Appellants
Vs.
The State of Maharashtra & Ors. ...Respondents

Mr. D.G. Khamkar, Adv for Appellant Nos.1,2 & 4 (orig. accd.1,2&4)
Mrs. Usha Andewar, Adv for Appellant No.3(orig.accdNo.3)(Adv apt)
Mr. A.R. Patil, Addl. P.P for Respondent State.

CORAM: DR. S. RADHAKRISHNAN &
SMT.ROSHAN DALVI, JJ.
Date of Reserving for Judgment : 15th October, 2007
Date of Pronouncement of Judgment: 23rd November,2007

JUDGMENT (Per Smt. Roshan Dalvi, J.)

1. The appellants/accused have been charged and convicted for the offence of murder of one Abhiman Sadar and sentenced to suffer imprisonment for life and for commission of the offence under Sections 302 r.w. 34 of the Indian Penal Code and to pay a fine of Rs.500/- i/d to suffer further Rigorous Imprisonment for 3 months. They have challenged the said conviction and sentence.

2. The charge against the appellant/accused was firstly that they committed murder of one Raju Jamadar on 23rd May, 1996 at about 5.00 p.m. To 6.00 p.m at Unit No.19, Rajapur Pada area, Aarey Colony, Goregaon (East), Mumbai-400 065 by inflicting injuries with deadly weapons and thereafter during the course of same transaction committed the murder of the said Abhiman Sadar, while running away from the spot after the murder of Raju punishable under Section 302 r.w. 34 of Indian Penal Code and subsequently, in the course of same transaction, they assaulted one Veluswamy Parimal Devendran with sickle while running away from the spot of the incident by inflicting injuries on his chest and other parts with such intention and knowledge that under the circumstances if it had caused his death, they would have been guilty of murder punishable under Section 307 of the Indian Penal Code.

3. The prosecution has examined 8 witnesses. The case of the prosecution depends almost entirely on eye witness' account. The F.I.R has been lodged by a police officer who was on patrolling duty. His evidence as P.W.1 shows that the a boy came running towards the vehicle. He and the other police officers on duty asked him what was the matter? He disclosed that he and his associates murdered one

person in the slum near Aarey Colony. P.W.1 and the Officers went to that place. They found the person in injured condition. The injured got up and kicked accused No.1. He gestured the officers to show that the accused and his associates had assaulted him. He pointed a finger at accused No.1. He was Veluswamy. He was bleeding, he was taken to the hospital. Thereafter the accused No.1 disclosed to the officers that he had not assaulted that injured person, but some other person. Again the officers went on the spot. They found the dead body of one male person. His widow was beside him. He had injury on his chest, stomach and back. His widow disclosed his name as Raju Jamadar. P.W.1 informed the control room and a Police officer was sent and F.I.R was recorded. That is marked as Exhibit-9. He has identified accused No.1 in Court.

4. The said Veluswami who was injured and in respect of whom the charge under Section 307 of the I.P.C has been framed, has not been examined. He is stated to have immigrated to a Gulf Country. There is no evidence with regard to the assault upon Raju Jamadar also.

5. P.W.No.2 has deposed that on 23rd May, 1996 at about 6.00 p.m when he was on duty in a vehicle, he saw a person running towards the vehicle looking frightened. He and his

colleagues obstructed him. The said person had sustained injury on his head (backside). He confessed his involvement in assaulting a person in Unit No.19, near a slum of Aarey Colony. He disclosed his name as Ramesh Vayade and of his three associates i.e. Navasha, Babu and Dilip. They went towards the spot and saw the injured. He had sustained injury on his chest. On seeing them, the injured gave a kick to Ramesh Vayade. He spoke in a vernacular language which was not understood. He gestured and pointed a finger at that person. That was accused No.1, who was identified by P.W.2 also. The injured was taken to the hospital. The person also disclosed his involvement in eliminating one Raju along with his 3 associates. He stated that whilst he was fleeing after assaulting Raju, they assaulted Veluswamy. They were taken to the spot where Raju was assaulted. A dead body of an old person was found with injuries on his chest, stomach and hands. Blood was oozing out of injuries. His widow was by his side.

6. P.W.3 has a Pan-beedi stall near that place. He has deposed that near his shop 4 persons came on 23rd May, 1996. He knew them by their faces and names. He identified all the accused, as those 4 persons and as the owners residing near his shop. He knew them for 6 to 7 years. They were coming down the hill with sickles in their

hands, running. An old man was going to lavotary, whose name he did not know. They came running and assaulted him on his stomach. He fell down and was bleeding. They ran away. Accused No.3 assaulted him with a sickle, accused No.3 with a 'Gupti' and accused No.1 with a small weapon. He has not deposed about appellant/accused No.2 and not assigned any role to him. He was being rushed to the hospital. He died on the way. The weapons shown to him in Court have been identified by him as the 'Koita' of accused No.3 and sickle of accused No.1 and the knife of accused No.4. They were accordingly marked as Articles in evidence. A pipe, the use of which was not assigned to any accused, was marked "X" for identification.

7. Though there have been no eye witnesses to the assault upon Raju, which resulted in his death and the assault upon Veluswamy, who recovered thereafter, P.W.3 is the eye witness to the assault on the consequent murder of the old man whose name he did not know. That old man is Abhiman Sadar.

8. His cross examination is showing that his shop was near a hill which is 150' away. It is not covered by trees, plants and shrubs. People used that area for nature's call. The old man was about 45 ft. from his shop when the

incident happened. He wore a lungi, chabba and a pagri. He deposed that he did not know the persons who had carried the injured to his house along with him. His house was 60 ft. from the spot of the incident.

9. To the specific question put in the cross examination he answered that the old man was assaulted mostly on his stomach, but also on his head and back, a fact corroborated by P.W.7, as shall be seen presently. He has further answered that the old man was pressing his stomach with his hands when he went to the old man. He saw lot of bleeding, his clothes were soaked in blood. He took the old man to his house.

10. His cross examination shows that he did not disclose the names of the assailants to Sadar's wife. That was because he did not know their names though he knew them. He thereafter returned to his shop, he never lodged any complaint. It may be mentioned that in paragraph No.1 he stated that he knew those people by their faces and names. Yet no complaint was filed. He did not take the injured to the hospital also but left him in the care of his wife. It has been argued on behalf of the accused that is an unnatural act or conduct. The witness has further deposed that he did not talk about the incident to any one. He has not visited

the police station at any time. His statement has been recorded on the next day at 11.00 a.m as can be seen from the evidence of P.W.7, the Police Officer who investigated the case. That Police Officer has not been able to produce any case diary showing the recording of the statement of, specifically this witness though he was an eye witness, to the assault and consequent murder of Abhiman Sadar.

11. P.W.4 is the panch who has deposed about the recovery of Koita at the instance of accused No.4 from the roof of his hut under a wooden log. He has identified the weapon. He has deposed that the door of the hut was open. The recovery is therefore, not regular. The evidence of the other panch P.W. 6 with regard to the recovery of the said weapon as well as other weapons show that the hut was open and the door was not locked. It has been argued on behalf of the accused that the same weapon has been identified as having upon recovered at the instance of accused No.3 by P.W.8.

12. P.W.No.5 has been examined as panch. He is sweeper of the area. He identified appellant/accused No.2. He has deposed that he was having the blood stained clothes which consisted of a black full sleeve shirt and a cream colour pant. These were seized by the police. He identified the clothes. It may be mentioned that there is no other evidence

against the appellant/accused No.2.

13. P.W.6 has been examined as panch for the recovery of the weapon at the instance of the accused No.3 whom he identified in the Court. He deposed that the weapons being knife, gupti and sword were kept in one place. He took the panchas to that place which was on a hill top near the side of picnic point in Aarey Coloney, Unit No.19. The jeep was halted below the hill top and the accused with the panchas and the police walked to the hill top. Accused No.3 took out one chopper, a knife and a gupti by removing a stone. He has not deposed about any Koita which was stated to be one of the weapons used by the accused. His evidence shows that the weapons were hidden below the stone. All the three weapons were stained with blood. They were recovered and panchanama was made which has been marked as Exhibit-30 in evidence. The witness identified his signature at serial No.2 on the panchanama. He could not identify the other signature. He later identified the other signature as that of the other panch. The chopper, knife and gupti have been marked Articles 2,3 and 6 respectively. The witness identified the chopper and the knife which were earlier marked. The chopper was stated to have been used by the accused No.3.

14. The cross examination of this witness shows that the stone under which the weapons were concealed was a big one. He has stood by the panchanama. However, P.W. 8 ACP of Anti-corruption Bureau who was assigned investigation of this case on 6th June, 1996 has deposed that at the time of this recovery accused No.3 led them to the forest of Unit No.19 of Aarey Coloney. It was a place like a cave from where he took out these weapons, which were stained with blood. They were seized. He made an entry in the muddemal register at serial No.54 which has been produced in Court and marked Exhibit-48.

15. It is argued on behalf of the appellant/accused that the recovery of the weapons is not proved since the panch has deposed that the weapons were recovered from underneath stone, and the Police Officer has deposed that they were recovered from a place like a cave, which are two different places. It is, therefore, argued that the evidence of the panch is not corroborated by the evidence of the Investigating Officer. It is also argued that, the Koita which is one of the weapons supposed to have been used by one of the accused, has not been shown to be recovered. It is also argued that whatever be the recovery is from an open space. It may be mentioned that there is a difference between a Koita and a chopper which has not been understood and

differentiated by the panch witness. However both are deadly weapons which would cause similar injuries. If the weapons are concealed below a stone which was a big one, the officer's explaination that the place was like cave would stand to reason since that would be a cavity in which the weapons could have been concealed. In such a case the cave would not be an open place from which the recovery made would stand vitiated. The place from where a recovery is made is seen to be a place known only to the accused who concealed the weapons there. They were concealed from the public, since they were below a big stone. They are not expected to have been put there by any person other than the accused. However, this recovery is 4 months after the incident.

16. P.W.No.7 is the Police Officer who received the message by wireless at 6.00 p.m that a person was lying in injured condition. He made an entry in the station diary and left for the spot. He reached the spot of the incident at about 6.30p.m. The Police Officer in the wireless van informed that the injured was shifted to Cooper Hospital. That injured person was Abhiman Sadar. He was also informed that another person was taken to the hospital and was lying unconcious. That was Veluswamy. At the spot of the incident there was yet another person lying cold and

motionless. He was not breathing. He was dead. That person was Raju Jamadar. He recorded the statement of the Police Officer on duty as the FIR and registered the crime under Section 302, 307 r.w. Section 34 of the Indian Penal Code under C.R.No.66 of 1996. That was the FIR given by P.W. No.1 and marked Exhibit-9 in evidence.

17. He got an inquest panchanama done in respect of the dead body of Raju Jamadar. He had 13 injuries. He collected the blood from the spot of the offence. The inquest panchanama has been marked Exhibit-33.

18. He went to Cooper Hospital, where two injured persons were admitted. Accused No.1 was also the injured person admitted to the hospital. He had a head injury. The other injured person was Veluswamy. The Doctor did not allow him to take the statement of Veluswamy, as he was not in a fit condition to give statement then. He took the certificate of the Doctor. The other injured victim was Abiman Sadar. He was admitted to the ICU. The Doctor was busy giving him treatment.

19. The presence of accused No.1 with the head injury in the hospital shows his presence at the scene of offence. It is contended on behalf of the accused that though the accused

No.1 was present, no weapons have been recovered from him.

20. The eye witness' account of P.W.3 does not mention about any injury to accused No.1. However, P.W.7 has deposed that the accused No.1 was brought from the spot itself to the hospital in the Andheri Mobile Police Van and he was taken in custody from the hospital itself and brought to the police station. He was arrested under an arrest Panchanama and his clothes were seized. Though the Police Officer P.W.7 has deposed “clothes of the accused were seized, the evidence shows only the clothes of the appellant/accused No.2 having been seized in the presence of the panch P.W.5.

21. P.W.7 went to the hospital on the next day and recorded the statement of the injured Veluswamy. His deposition shows that he recorded statements of some other witnesses on 25th May, 1996. Consequently the statement of the eye witness P.W.3 came to be recorded belatedly. It was not recorded on the date of the incident at the spot. That is understandable because two injured persons were to be shifted to the hospital. That was the priority action required. On the next day the Officer recorded the statement of the injured witness Veluswamy but not of the eye witness P.W.3.

22. P.W.No.8 is the Senior Police Inspector, the ACP from the Anti-corruption Bureau who was assigned investigation of this case on 6thJune,1996. He arrested accused No.4. Interrogation resulted in his voluntary statement about the weapon used in the offence and concealed by him. That was the weapon recovered under panchanama Exhibit-22/23, which the Officer also identified. P.W.4 has been examined as panch in this behalf. He has proved the panchanama Exhibit-22/23, the weapon being the Koita recovered at the instance of accused No.4 under the panchanama Exhibit-22/23 has been recovered from his house. The evidence of P.W.4 shows that it was hidden in the roof under the wooden log of the Kachha hut of the accused No.4.The hut was found open.

23. It could be seen that a knife, gupti and a sword have been recovered at the instance of accused No.3 from the deposition of P.W.6. That recovery is from underneath a stone on the hill top by the side of the picnic point, Unit No.19 in Aarey Colony. A Koita has been recovered at the instance of accused No.4. That recovery is from under a wooden log in the roof of Kachha hut of accused No.4. It is argued on behalf of the appellant/accused that the recovery of one weapon is shown at the instance of Accused No.3 as well as 4. The evidence of the eye witness does not show

accused No.2 to be carrying any weapon. It does not assign any role in the assault of any victim to accused No.2. P.W. 3 has identified three weapons for the four accused whom he identified in Court. P.W. 4 has identified only one Koita recovered at the instance of accused No.4 which has been marked Article No.2 in evidence. P.W.6 has deposed about three weapons of the three accused who were seen to have used the weapons for assaulting the three victims in this case. All these three weapons are recovered at the instance of accused No.3 from the hill top under the stone as aforesaid. Consequently there is some substance in the argument of the Advocates on behalf of the accused that the same Koita is shown to be recovered at the instance of accused No.3 as well as accused No.4. However, the evidence of P.W. 6 does not speak about Koita (Sickle) and it shows the recovery of one chopper, one knife and one gupti. These are articles 2,3 and 6. Articles 2 and 3 were already marked in evidence before the evidence of P.W.6. Surprisingly in all four weapons are recovered, though accused No.2 is not shown to have used any weapon and none is recovered at his instance.

24. The accused No.3 is stated to have been arrested on 18th June, 1996 by P.W. 8. The recoveries of three weapons are, thereafter made. The recoveries of three weapons which are

stated to be blood stained is made about 26 days after the date of the incident. The muddemal register entry at serial No.54 which is marked Exhibit-48 is made on 25th June, 1996 when the articles were recovered.

25. All the recovered articles which are stated to be blood stained were sent to the Chemical Analyst for analysis. The Chemical Analyst's report is marked at Exhibit-50. The blood samples of the deceased Raju Jamadar and the deceased Abhiman Sadar were also sent to the Chemical Analyst and their reports are marked Exhibits-51 and 52. The blood groups of two deceased could not be determined. Hence, the prosecution has not placed much reliance upon the Chemical Analyst's reports in respect of the blood stains stated to be found on the weapons or upon the clothes of the accused.

26. P.W. 9 is the Doctor, who prepared the Postmortem report on the bodies of the two victims Raju Jamadar and Abhiman Sadar. He has listed 13 injuries which could have been caused by sharp and hard weapons. He has also deposed about the internal injuries to the left lung as well as the intestines of the deceased. These injuries have been stated to be sufficient to cause his death. He has listed five injuries suffered by Abhiman Sadar. He has also deposed about

internal injuries to the colon and the spleen of Abhiman Sadar. These are also deposed to be sufficient to cause death and such as to be caused by sharp and hard weapons. The Doctor has been shown articles 2,3 and 6 and has deposed that those weapons could have caused such injuries.

27. The fact that three people fell victim and two of them sustained fatal injuries is seen. The third victim was also grievously assaulted. He has since recovered. He has however, not deposed before the Court. He is stated to have emigrated to one of the Gulf Countries. It would have to be seen from the aforesaid evidence as to whether the accused in this case, and none other, caused fatal injuries upon Raju Jamadar and Abhiman Sadar. The prosecution case shows the evidence of two Police Officers who went to the spot of the offence as soon as the incident occurred. They have seen the victims who were injured. The accused had run away. They have not apprehended the accused immediately. Only accused No.1 is stated to have been taken to the hospital as per the deposition of P.W. 7 since he was also injured in the incident. The evidence of P.W. 1 shows how accused No.1 made an extra judicial confession to him about how he caused injuries to the victims. His evidence shows that the accused No.1 prevaricated. He initially disclosed that he

assaulted the injured victim Veluswamy. He took the police to the man who kicked him and gestured to the police that he was the assailant. However, Veluswamy has not been examined. Since he has not deposed, his gestures cannot be used in evidence against accused No.1. The prevarication of accused No.1 reflected in the evidence of P.W.1 is contained in the deposition in para No.1 of his evidence that while the accused and the injured were being taken in the police vehicle to the hospital, the accused disclosed that he did not assault that injured Veluswamy but that he assaulted some other person. They were taken to the dead body of Raju Jamadar. There is no eye witness' account that the dead body was at a public place, his widow was standing near the dead body. She has also not been examined. The evidence of P.W. 1 does not show the injuries suffered by P.W.1 though he took P.W.1 in his van. His evidence is not an eye witness' account the statement made by the accused No.1 cannot be used against him.

28. The other Police Officer has deposed about the fact that the accusedNo.1 was running when he was apprehended. He was very much frightened. He had an injury on the back of his head. His evidence shows how accused No.1 disclosed about his involvement along with his associates in assaulting one person. He was taken to the injured who had injury in

the chest. That was Veluswamy who kicked the accused No.1 and spoke in South Indian language which was not understood and made the gestures. Though this part of the evidence is corroborated, for want of the evidence of Veluswamy, the injured witness himself, this evidence cannot be used against accused No.1.

29. P.W.3 the eye witness has deposed about the fact that all the four persons were running. He has not assigned any role to accused No.2. His evidence shows how an old man, who is now shown to be Abhiman, came in the way of the accused and was assaulted on his stomach. He has shown the three weapons used by accused Nos.1, 3 and 4. He has not lodged any complaint. He took the victim to the house and not to the hospital. He has not deposed about what happened in the hospital except that the victim died on the same day. His statement was recorded along with the statements of other witnesses on 25th May, 1996, two days after the incident. However, his evidence shows that he had never visited the police station. He is the star witness of the prosecution. In what circumstances his statement was recorded or where it was recorded is not clearly shown. He has not described the incident. His evidence does not show how Raju Jamadar or Veluswamy were assaulted. He is the witness of only a part of the incident. His cross examination

shows that in his statement he had not stated which particular weapon was held by which particular accused. He was not shown the accused prior to his deposition in Court. His deposition has been recorded in March, 2001, about 5 years after the incident. In view of all the aforesaid circumstances it becomes difficult to rely upon his evidence to nail any of the accused for any of the offenses with which they are charged.

30. Though the recovery of the weapons articles 2,3 and 6 at the instance of P.W.4 and 6 are shown, it is seen that one was recovered from the hut of accused No.4 and 3 weapons were recovered from under the stone on the hill top in Aarey Colony, Unit No.19. Consequently there is anomaly with regard to at least one of the weapons. Though the nomenclature or the names of the weapons being taken as Koita (sickle) or chopper may not vitiate the entire recovery, the fact that one Koita is shown to be recovered at the instance of accused No.4 from his hut and a chopper is shown to be recovered at the instance of accused No.3 from the hill top creates a doubt as to the evidence of P.W. 4 and 6. It would therefore, be inappropriate to rely upon the evidence of recovery of the weapons against any of the accused.

31. Though the Doctor's evidence from the Postmortem Report shows fatal injuries upon two victims Raju Jamadar as well as Abhiman Sadar, their blood groups not having been determined, the recovery of the blood stained clothes as well as the blood stained weapons to be at the instance of the accused 3 and 4 cannot show their involvement. The Chemical Analyst's report, therefore, does not take the prosecution case any further.

32. No evidence is shown against accused No.2 the evidence against accused Nos.3 and 4 is difficult to accept in view of the recovery of the blood stained weapons and the lack of any Chemical Analysis showing their involvement in the crime. The main evidence against accused No.1 is of the two Police Officers P.W. 1 and 2 who spoke about the inculpatory statements of accusedNo.1 himself aside from the evidence relating to a part of the offence of accused No.3 showing the accused running and assaulting one of the three victims. In this case, there is no eye witness account against accused No.1 also. The only aspect against him is that as per the evidence of P.W. 2 and P.W. 7 and P.W. 8 he also suffered an injury on the back side of his head and was taken to the hospital from where he was directly taken to the police station and arrested. There has been no recovery of any weapon at his instance.

33. We may mention that the evidence collected and collated by the Investigating Officer in this case, though one of them was ACP of the Anti Corruption Bureau, has been far from satisfactory. Statements of the witnesses have not been recorded with the expedition that was required. The main injured witness has not been produced before the Court. Only a statement that he has emigrated to one of the Gulf Countries has been made. That shows that he is not even been contacted despite a claim of contacting the Interpol . The arrest of the accused and the recovery of the weapons are made after an inordinate delay. The articles were sent to the Chemical Analyst on 5th August, 1996, about 2.1/2 months after the incident. Consequently the blood stains, if any, could not be determined by the Chemical Analyst.

34. Under the aforesaid circumstances we hold that the accused No.2 deserves to be acquitted. We are constrained to give the benefit of doubt to the accused Nos.1,3 and 4.

35. Consequently the Appeals succeed.

36. The Judgment of the trial Court convicting and sentencing all the accused is set aside.

37. The accused shall be released forthwith if not required in any other case.

(SMT. ROSHAN DALVI, J.) **(DR. S. RADHAKRISHNAN, J.)**